IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 472 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SURENDRASINH N RAJPUT

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 472 of 1998

MR BHARAT T RAO for Petitioners No. 1-3

Mr B D Desai, APP for Respondent No. 1

Mr H N Joshi for M/S THAKKAR ASSOC. for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 19/02/2002

ORAL JUDGEMENT

The petitioners above named have preferred this revision application under section 397 read with section 401 of the Code of Criminal Procedure, 1973 (for short,

'the Code') challenging the order recorded by the learned Judicial Magistrate First Class, Gandhinagar in criminal case no.7295/96 under which the learned Magistrate dismissed an application of the present petitioner, for their discharge from offence punishable under section 138 of the Negotiable Instruments Act, 1881. (for short, 'the Act')

2. The case of the contesting respondent herein before the trial court was that the contesting respondent had deposited some amount with the Ahmedabad Urban Cooperative Bank at Ahmedabad and the said amount was placed in Fixed Deposit. That the contesting respondent wanted to encash the said Fixed Deposit Receipt, the amount was not paid in cash but cheques were issued as detailed in the complaint for a total amount of Rs.10 lakhs. The cheques were presented before the Bank and they were dishonoured as the bank account did not have sufficient balance to honour the cheque. Hence the complaint. Learned Advocate for the petitioners contended before the trial court that the present petitioners No.1 and 2 were not connected with the affairs of the bank. so far as the concerned branch of the bank is concerned. That the notice issued by the contesting respondent under section 141 of the said Act was not in consonance with the provisions made in section 141 of the said Act and, therefore, the contesting respondent could not proceed against the petitioners legally. Therefore, they had applied for their discharge from the said complaint. After hearing the parties, the learned Magistrate dismissed the said application and hence this revision application.

3. It has been contended here that it is not much in dispute that the petitioners no.1 and 2 have not been served with notices under section 141 of the Act. Therefore, at least these two petitioners could not have been held responsible. This has not been properly appreciated by the trial court and therefore, the order of the trial court is illegal, perverse and deserves to be quashed and set aside. It is, therefore, prayed that the present revision be allowed with respect to petitioners no.1 and 2 and they may be ordered to be discharged from the proceedings in question.

4. It may be stated at this juncture that so far as petitioner no.3 is concerned, this revision application has not been pressed with respect to him and therefrom, it will naturally stand disposed of as not pressed.

5. Rule was issued and Mr H N Joshi, learned

Advocate appeared for M/s. Thakkar Associates on behalf of original complainant. Mr B D Desai, learned APP appears for the State of Gujarat. At the hearing, it was stated at the outset by Mr Desai that he supports the arguments of Mr B T Rao, learned Advocate for the petitioners and opposes the arguments advanced by Mr H N Joshi, learned Advocate for the contesting respondent-original complainant. It is not much in dispute that the notice issued under section 141 of the said Act is a notice issued to the Branch Manager, Ahmedabad Urban Cooperative Bank Ltd., Sarangpur-Audhav Main Road Branch, Sarangpur at Ahmedabad. It is not much in dispute that so far as petitioners No.1 and 2 are concerned, no notice is issued to and served upon them at the address given by the complaint. Mr Joshi, learned Advocate arguing the matter on behalf of the petitioner states that the notice issued to the Branch Manager must be considered good as a notice issued to the Bank itself and, therefore, there is sufficient compliance under section 141 of the said Act. Now it is not shown as to whom the notice could be served and whether it was required to be served upon the bank itself. The original complainant has to make it clear as to who is authorized to receive such notices on behalf of the Ahmedabad Urban Cooperative Bank Ltd. The complainant has not cleared his position and, therefore, there is nothing on record to show that the notice issued to the Branch Manager of the aforesaid bank can be treated to be a notice issued to and served upon the present petitioners no.1 and 2.

6. Numerous decisions have been shown by the learned Advocate for the petitioners in support of his arguments. At one stage, an argument was advanced that this is an interlocutory order and, therefore, revision application is not maintainable in view of the provisions made in sub-section (3) of section 397 of the Code. The petitioners have made an application for their discharge and that application has been dismissed, meaning thereby, the petitioners will be required to face trial. In that view of the matter, the order cannot be treated to be an interlocutory order and, therefore, this argument will not help the contesting respondent.

7. Another argument advanced on behalf of the contesting respondent is that there is no provision made in the Criminal Procedure Code for discharge of the accused persons in summons triable criminal cases. Simply because there is no affirmative provisions for discharge of accused in a summons triable case, it does not mean that the accused would not be entitled to acquittal or discharge before the commencement of trial.

It also does not mean that such an accused person will be required to face trial even if the complaint discloses no offence against them.

7. It has also to be borne in mind that when the trial proceeds, the plea of the accused is required to be recorded and for recording of plea, accusations against the accused persons are required to be placed on record in order to ascertain as to whether the accused wants to admit those accusations. Now if at this stage, on the reading of the complaint and other materials on record if it cannot be made out whether there are some accusations which cannot be put to the accused persons, then in that case, can it be said that the accused person must face trial and he cannot be acquitted at that stage. This can be gathered from Section 251 of the Code wherein it is made clear that when in a summons case the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him.

8. Now in the present case, the offence said to have been committed is under section 138 of the said Act. The scheme of the Act envisages that an offence can be said to have been committed if the cheque is issued by a particular person and it has been dishonoured in accordance with law. The requirement under sections 138/141 of the said Act further requires that notices should be issued in accordance with section 141 and if the notices are not complied with within the stipulated time, then the offence can be said to have been committed under sections 138 of the said Act. These are the facts which may be required to be incorporated in the accusations in accordance with section 251 of the Code. Now when it is an admitted position that the petitioners No. 1 and 2 herein have not been served with notices under section 141, no offence can be said to have been committed by these two petitioners. If no offence can be said to have been committed by these two petitioners, then in that case, it would not be open to the Court concerned to place substance of accusations against them in accordance with section 251 of the Code. In that view of the matter, if at this stage no offence is said to have been made out and no accusation can be placed to the accused, there is nothing wrong to acquit the accused from the offence.

9. In the case of M/s. Steel Build v. M/s. K Mukund & Co., reported in 2002 (1) GLR 2000, it was observed that the order of the learned Magistrate issuing process cannot be interfered with in a revision unless

same is arbitrary or capricious. There the powers of the Magistrate to drop proceedings under section 258 of the Code has also been discussed. This is not a matter for dropping the proceedings under section 258 of the said Code. Here the accused persons have requested the court below that on account of some technical difficulty, it is not legally permissible to prosecute them and therefore, they have applied for discharge or acquittal, as the case may be. Therefore, this decision will not apply to the facts of the case before this Court.

9.1. In the case of John Thomas v. Dr. K Jagadeesan, reported in JT 2001 (5) SC 398, again there is a reference to stop the proceedings under section 258. There it has been observed that section 258 of the Code deals only with summons cases instituted "otherwise than upon complaints" and it has no application to cases instituted on complaints. This is not a matter for dropping of proceedings under section 258 of the said Code and, therefore, this decision will also not apply to the facts of the case before us.

9.2. In M/s. Bilakchand Gyanchand Co. v. A Chinnaswami, reported in 1999 Cr.L.J. 3498 (SC), the matter was pertaining to section 18 of the Negotiable Instruments Act, 1881. There the cheques were signed by M.D. of the company and notice under section 141 of the Act was sent to M.D., who was signatory of the cheque. There it was found that the complaint was not liable to be quashed on the ground that the notice was not served on the company itself. Naturally, when the notice was issued to the M.D. of a Company, it amounts to a notice to the company itself. When a bank has several branches and a separate Head Office, then the notice to a particular Branch Manager cannot be treated to be a notice to the bank itself. Therefore, even the above decision cannot apply on the facts of the case before us.

9.3. In the case of Rajneesh Aggarwal v. Amit J Bhalla, reported in 2001 (3) GLR 2499, again it was a matter of section 138 of the Negotiable Instruments Act, 1881. There the notice was issued in the name of the Director of the company who had signed the cheque. It was held that the High Court was not justified in holding that the notice was not valid and it was issued to the accused in his individual capacity. In the present case, notice to the Branch Manager was issued in his official capacity. Therefore, that accused will not be able to take any such contention. However, so far as the other accused are concerned, it cannot be said that notice has been served upon them also.

9.4. In the case of K P G Nair v. M/s. Jindal Menthol India Ltd., reported in 2000 Cri.L.J. 1213, again it was a matter of section 138 and 141 of the Negotiable Instruments Act, 1881. There the question related to a disputed question of fact whether or not a particular person had resigned as Director before issuance of offending cheques. This would naturally be a matter of fact and it cannot be decided as a preliminary issue. In the present case, the facts are quite different. Petitioners No.1 and 2 have come out with a case that they have not been served with notice under section 141 of the said Act. It is not the case of the original complainant that they were served with notice. Had that been an averment in the complaint or elsewhere that petitioner no.1 and 2 have been duly served with notices, then it would have been a question of fact which would have been dealt with and decided on the basis of evidence before the Court.

10. In the present case, it is not the case of the original complainant that petitioner no.1 and 2 were served with notice or that notice was issued to them. Therefore, it is not a question of fact and therefore, the issue can be decided if no evidence is recorded. In short, I am of the opinion that simply because there is no provision in discharge or acquittal before recording the plea or thereafter, it cannot be said that the accused person must face trial and they cannot be acquitted before conclusion of the trial. If there is any disputed question of fact, the accused cannot seek any indulgence and no acquittal order can be passed. But here it is found that it is an admitted position of fact that a particular accused or a set of accused are not found to be guilty ex-facie, on the aforesaid technicality, then is it necessary for those accused persons to face the trial ? Here again and again it has been argued that the notice has been issued to the Branch Manager only. Moreover, the address of the main office is different from the address of the branch office. Therefore, there is no reason to infer that the notice issued to the Branch Manager petitioner no.3 can be treated to be a notice issued to petitioners no.1 and 2. Section 141 of the said Act makes it clear that before a prosecution can come into play, the complainant is bound to issue notice to the accused. In the present case, no notice has been issued to petitioners no.1 and 2 under section 141 and therefore, in absence of notice under section 141 of the said Act against petitioners no.1 and 2, petitioners no.1 and 2 are required to be acquitted at the initial stage, since they are not liable to be

prosecuted without a statutory notice under section 141 of the said Act. So far as petitioner no. 3 is concerned, learned Advocate for the petitioner has made a statement in the beginning that he does not press this revision with respect to petitioner no.3 and therefore, the original complainant can proceed with the complaint against petitioner no.3.

11. For the foregoing reasons, this revision application is partly allowed. The revision application of petitioner no.3-Jitubhai Shah being the Branch Manager of Ahmedabad Urban Cooperative Bank is ordered to be dismissed as withdrawn by the learned Advocate for petitioner no.3. Revision Application of petitioners no.1 and 2 herein is ordered to be allowed. They are ordered to be acquitted from the offence punishable under section 138 of the Negotiable Instruments Act, 1881. Rule is partly made absolute to the aforesaid extent. D.S. permitted.

19.2.2002 [D P Buch, J.]
msp